ST 00-0003-PLR 02/29/2000 OCCASIONAL SALE

An occasional sale is a sale of tangible personal property at retail by a person who does not hold himself out as being engaged or does not habitually engage in selling such tangible personal property at retail. 35 ILCS 120/1. (This is a PLR).

February 29, 2000

Dear Mr. Xxxxx

This Private Letter Ruling, issued pursuant to 2 Ill. Adm. Code 1200 (see enclosed), is in response to your letter of January 6, 2000. Review of your request for a Private Letter Ruling disclosed that all information described in paragraphs 1 through 8 of subsection (b) of the enclosed copy of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to COMPANY for the issue or issues presented in this ruling. Issuance of this ruling is conditioned upon the understanding that neither COMPANY nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request.

In your letter, you have stated and made inquiry as follows:

On behalf of COMPANY, a STATE corporation, we hereby request certain rulings from the Illinois Department of Revenue, pursuant to 2 Ill. Adm. Code Sec. 1200.110, regarding the applicability of the Illinois ROT ('ROT') and/or the Illinois Use Tax ('Use Tax') to the following transactions. Enclosed as Exhibit 1 is a Form IL-2848-'Power of Attorney' designating the undersigned as entitled to submit this ruling request on behalf of COMPANY.

FACTS

On December 30, 1999 COMPANY sold tangible personal property, consisting of equipment ('Equipment') located in eleven states other than Illinois, to TRUST. COMPANY presently intends to sell tangible personal property consisting of an airplane ('Airplane') located in Illinois to the Trust, pursuant to a FAA bill of sale which has not yet been drafted. The Trust is a single purpose business trust created to hold title to this property, accept delivery of such property and to lease this property back to COMPANY. Under the trust agreement, COMPANY has one year from the first sale to transfer additional property to the Trust on not more than three occasions.

The property sold to the Trust is leased-back to COMPANY pursuant to a master lease and security agreement, dated as of December 23, 1999 (the 'Lease'). A copy of the Lease is attached hereto as Exhibit 2. When the Airplane is sold to the Trust, it will be leased back to COMPANY pursuant to a lease supplement, a copy of the latest draft of which is attached hereto as Exhibit 3, which simply modifies the Lease to include the Airplane. Section 2.3 of the Lease provides that the term of the Lease with respect to any property commences on the date the property is acquired by the Trust and terminates on the first anniversary of the date upon which certain conditions precedent to the documentation of the sale of equipment to the Trust occurs; the Lease term will end on the same date for all property transferred to the Trust, regardless of whether or when property is transferred to the Trust after the first sale. Under Article 16 of the Lease, at the end of the Lease term, COMPANY has the option to purchase the Equipment and Airplane, renew the lease, or remarket the Equipment and Airplane. First, COMPANY may purchase all of the property subject to the Lease at a purchase price that is equal to its projected fair market value. Second, COMPANY has the option to extend the lease term for one or more one-year renewal terms. In total, COMPANY has four one-year renewal options. Third, COMPANY may elect to remarket all of the Equipment and Airplane subject to the Lease on behalf of the Trust.

COMPANY represents that it is not in the business of selling airplanes.

For accounting purposes, the transaction will be treated as a sale of the Equipment and Airplane and a lease thereof to COMPANY. For federal tax purposes, the transaction will be treated as a financing arrangement.

To the best of our knowledge, the Department has not previously ruled on the same or a similar issue for the taxpayer or a predecessor, and neither the taxpayer nor any of its representatives previously submitted the same or a similar issue to the Department that was withdrawn before a letter ruling was issued.

REQUESTED RULINGS

Specifically, we request the following rulings:

1. The sale of the Airplane by COMPANY to the Trust is exempt from the ROT because it is an occasional sale, and the purchase of the Airplane by the Trust is exempt from Use Tax because it does not acquire the Airplane in a taxable sale at retail.

2. The Lease of the Airplane by the Trust to COMPANY and rentals paid pursuant thereto are exempt from the ROT and Use Tax because the Lease will be treated as a lease for ROT and Use Tax purposes.

3. The sale by the Trust of the Airplane to any person at the end of the Lease term would be exempt from the ROT because it would be an occasional sale, and the purchase of the Airplane from the Trust by any person would be exempt from Use Tax because the purchaser would not acquire the Airplane in a taxable sale at retail.

ANALYSIS

1. GENERAL

In analyzing the applicability of the ROT and Use Tax to the sale of the Airplane, one must look to Illinois statutes and regulations. The relevant provisions thereof include the following:

(a) The ROT is imposed on each person engaged in the business of selling at retail tangible personal property. 35 ILCS 120/2.

(i) A 'sale at retail' means any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use or consumption and not for the purpose of resale in any form as tangible personal property. 35 ILCS 120/1.

(ii) An isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged or who does not habitually engage in selling such tangible personal property at retail does not constitute engaging in a business of selling such tangible personal property at retail within the meaning of this Act. 35 ILCS 120/1.

(iii) Persons who make isolated or occasional sales do not incur ROT because the Act does not impose a tax upon persons who are not engaged in the business of selling such tangible personal property. ROT Reg. Section 130.110.

(iv) Persons who are engaged in the business of selling tangible personal property who purport to lease the use of any such property to a nominal lessee but in fact sell such tangible personal property to the nominal lessee for use or consumption are liable for ROT. This is treated as a conditional sale from the outset and all receipts are subject to ROT. ROT Reg. Section 130.2010(a).

(v) Persons who under bona fide agreements rent or lease tangible personal property to others are not engaged in the business of selling tangible personal property to purchasers for use or consumption within the meaning of the ROT Act are not required to remit ROT, but such lessors are users of the property are subject to the Use Tax when purchasing tangible personal property which they rent or lease to others. ROT Reg. Section 130.2010(b).

(b) The Use Tax is imposed on the use of tangible personal property purchased at retail from a retailer. 35 ILCS 105/3.

(i) A 'retailer' means every person engaged in the business of making sales at retail. A person who holds himself out as being engaged in selling tangible personal property at retail is a retailer with respect to such sales. 35 ILCS 105/2.

(ii) An isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged or who does not habitually engaged in selling such tangible personal property at retail does not make such person a retailer. 35 ILCS 105/2.

(ii) 'Sale at retail' means any transfer of the ownership of or title to tangible personal property to a purchaser for the purpose of use and not for the purpose of resale. 35 ILCS 105/2.

(iii) If the seller of tangible personal property for use would not be taxable under the ROT Act despite all elements of the sale occurring in Illinois, then the Use Tax does not apply to the use of the tangible personal property. 35 ILCS 105/3-65.

2. SALE OF EQUIPMENT BY COMPANY TO THE TRUST.

Illinois imposes a tax on each person engaged in the business of selling at retail tangible personal property within the State and each use within the State of tangible personal property purchased at retail from a retailer. 35 ILCS 120/2; 35 ILCS 105/3. A 'sale at retail' includes any transfer of ownership of or title to tangible personal property. 35 ILCS 120/1; 35 ILCS 105/2.

However, an isolated or occasional sale of tangible personal property does not constitute engaging in a business of selling such property at retail. To be exempt from the ROT and Use Tax as an occasional seller, a person making sales of tangible personal property for use must not habitually engage in the sale for use or consumption of the type of tangible property at issue. 35 ILCS 120/1; 35 ILCS 105/2; *In re Stoecker*, 202 B.R. 429, 449 (Bkrtcy. N.D. Ill. 1996).

COMPANY does not habitually engage in the sale of airplanes. COMPANY represents that since COMPANY was organized, it has sold only four airplanes, the first of such sales occurring 14 years ago. In *Stoecker*, the leasing company was in the leasing business, having sold only one aircraft prior to the transaction at issue. *Stoecker*, 202 B.R. at 450. By having sold only four airplanes in the past 14 years, COMPANY does not habitually sell aircraft and cannot be considered to be in the business of selling airplanes.

Further, COMPANY does not hold itself out as being engaged in selling airplanes at retail. This conclusion is further supported by the fact that in three of its four prior airplane sales, COMPANY engaged a broker to sell the airplanes. Thus, a sale of one airplane by COMPANY to the Trust is an isolated or occasional sale of an airplane, and COMPANY is not subject to the ROT for the sale of the Airplane.

If the seller of tangible personal property for use is not taxable under the ROT provisions despite all elements of the sale occurring in Illinois, then the Use Tax does not apply to the use of the tangible personal property. 35 ILCS 105/3-65. See *Trans-Air Corp. v. Dept. of Revenue,* 86 Ill. App. 3d 750 (1980). Because COMPANY is not subject to the ROT, then the Trust is not liable for Use Tax on the use of the Airplane.

3. LEASE OF THE EQUIPMENT BY THE TRUST TO COMPANY.

Generally, lessors of tangible personal property under leases are deemed end users of the property to be leased. Therefore, the sale of property to a person who will act as a lessor is the sale at retail. ROT Reg. §130.220. Illinois does not impose a tax on rentals, so lessors and lessees incur no tax liability with respect to rentals. ST 99-0169-GIL.

Certain leases are treated as conditional sales. A conditional sale is generally characterized by a nominal purchase option at the close of the lease term, in other words, if lessors are guaranteed at the time of the lease that the leased property will be sold to the lessee, the transaction is considered to be a conditional sale at the outset of the transaction, making all receipts subject to ROT. ST 99-0169-GIL. If a lease contains a buyout provision, it must be at fair market value so that it is not recharacterized as a conditional sale. ST 99-0169-GIL. In this information letter, the Department notes that 'if the purchase option amounts to the fair market value of the tangible personal property, then the agreement would generally be considered to be a true lease.'

In this situation, the Lease is a true lease for sales tax purposes. The purchase option in the Lease provides that the Equipment and Airplane may be purchased by another person at prices that are equal to their projected fair market values, not at nominal purchase prices. Further, the Equipment and Airplane may be remarketed to third parties. As a true lease, the rentals under the Lease are not subject to ROT or Use Tax.

4. SALE OF THE PROPERTY BY THE TRUST TO A PERSON AT THE END OF THE LEASE TERM.

For the same reasons provided in Analysis #2, the sale of the Airplane at the end of the Lease term by the Trust to another person is an occasional sale which does not constitute engaging in a business of selling such property at retail. An occasional sale does not make the Trust a retailer, and so it is exempt from ROT and Use Tax on the sale of the Airplane.

The Trust is not in the business of selling airplanes. The Trust is in the business of leasing equipment. In *Stoecker*, the court determined that the leasing company was in the leasing business, having sold only one aircraft prior to the transaction at issue. *In re*

Stoecker, 202 B.R. at 450. The facts here are similar to those in *Stoecker.* The Trust is in the business of leasing several items of equipment and an airplane and will have one sale of an airplane. The Trust is, therefore, exempt from the ROT on the sale of the Airplane to a third person.

Further, the Illinois statute provides specifically that a person engaged in the business of leasing or renting motor vehicles to others and in connection with such business who sells any used vehicles to a purchaser for his use and not for resale is a retailer engaged in the business of selling tangible personal property at retail to the extent of the value of the vehicle sold. 35 ILCS 105/1a. It would appear that the Illinois legislature specifically intended to make sales by lessors of motor vehicles subject to tax. By negative implication, lessors who sell other types of property, such as property subject tot he Lease, are not retailers.

If the seller of tangible personal property for use would not be taxable for ROT despite all elements of the sale occurring in Illinois, then the Use Tax does not apply to the use of the property. 35 ILCS 105/3-65. Because the Trust would not be subject to the ROT, then the Use Tax would not apply to the use of the Airplane by the purchaser thereof after its purchase from the Trust.

CONCLUSION

The taxpayer has determined that there are no contrary authorities, or the taxpayer is unable to locate such authority.

We respectfully request your concurrence in our conclusions that:

1. The sale of the Airplane by COMPANY to the Trust is exempt from the ROT because it is an occasional sale, and the purchase of the Airplane by the Trust is exempt from Use Tax because it does not acquire the Airplane in a taxable sale at retail.

2. The Lease of the Airplane by the Trust to COMPANY is exempt from the ROT and Use Tax because the Lease will be treated as a lease for ROT and Use Tax purposes.

3. The sale by the Trust of the Airplane to any person at the end of the Lease term would be exempt from the ROT because it would be an occasional sale, and the purchase of the Airplane from the Trust by any person would be exempt from Use Tax because the purchaser would not acquire the Airplane in a taxable sale at retail.

If you have a contrary view, we request an opportunity to discuss the matter further.

CONFIDENTIALITY MATTERS

> In accordance with 2 Ill. Adm. Code 1200.110(c), we request that the parties names, COMPANY and TRUST, be deleted from the publicly disseminated version of this private letter ruling. We further request that you keep confidential and not make publicly available the attached Master Lease and Security Agreement and the Lease Supplement.
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> Thank you for your assistance in this matter. If you have any questions or need additional information, please call me at ####.

You have described a sale/leaseback situation in your letter. COMPANY, owner of an airplane, is going to sell that airplane to a Trust. The Trust is then going to lease the airplane to COMPANY. At the end of the lease term, COMPANY has the option to purchase the airplane, re-market the airplane to another, or extend the term of the lease.

In your letter and in subsequent telephone conversations, you have stated that COMPANY is not a retailer of airplanes and that Illinois Use Tax was paid on the airplane at the time it was brought into Illinois for use here. When COMPANY sells the airplane to the Trust, Retailers' Occupation Tax is not incurred because the sale is an occasional sale, which is exempt from taxation. An occasional sale is a sale of tangible personal property at retail by a person who does not hold himself out as being engaged or does not habitually engage in selling such tangible personal property at retail. 35 ILCS 120/1. The Trust does not incur Use Tax on this transaction because the sale is exempt from Retailers' Occupation Tax. 35 ILCS 105/3-65.

When the Trust leases the airplane to COMPANY, no tax is incurred because Illinois does not tax rental receipts. This is due to the fact that the State of Illinois taxes leases differently for Retailers' Occupation Tax and Use Tax purposes than the majority of other states. Lessors of tangible personal property under true leases in Illinois are deemed end users of the property to be leased. See the enclosed copy of 86 Ill. Adm. Code 130.220. Usually, as end users of tangible personal property located in Illinois, lessors owe Use Tax on their cost price of such property. In the case you describe, no tax was incurred by the Trust because the Trust's purchase of the airplane was an occasional sale. As stated above, the State of Illinois imposes no tax on rental receipts. Consequently, lessees incur no tax liability.

Finally, when the Trust sells the airplane coming off lease to either COMPANY or another entity, no Retailers' Occupation Tax is incurred because the Trust is not in the business of selling airplanes. Therefore, the sale of the airplane coming off lease is an occasional sale with no tax due from the seller or the purchaser.

The facts upon which this ruling are based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the material facts as recited in this ruling are correct and complete. This ruling will cease to bind the Department if there is a pertinent change in statutory law, case law, rules or in the material facts recited in this ruling.

I hope this information is helpful. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Melanie A. Jarvis
Associate Counsel

MAJ:msk
Enc.